**IN THE COURT OF APPEALS OF IOWA**

No. 9-1061 / 9-0926
Filed March 10, 2010

**IN RE THE MARRIAGE OF EVELYN BALICHEK AND GEORGE BALICHEK, JR.**

**Upon the Petition of**
**EVELYN BALICHEK,**
Petitioner-Appellant,

**And Concerning**
**GEORGE BALICHEK JR.,**
Defendant-Appellee.

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Appeal from the Iowa District Court for Jones County, Denver D. Dillard, Judge.

Petitioner Evelyn Balichek appeals challenging the economic provisions of the decree dissolving her long-term marriage to respondent, George Balichek Jr.

**AFFIRMED AS MODIFIED.**

John R. Newman of Wehr, Berger, Lane & Stevens, Davenport, for appellant.

Mark D. Fisher of Nidey, Wenzel, Erdahl, Tindal & Fisher, P.L.C., Cedar Rapids, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

**SACKETT, C.J.**

Evelyn Balichek appeals, challenging the economic provisions of the decree dissolving her thirty-nine year marriage. She contends that the parties' antenuptial agreement should not have controlled the division of farmland held in George's name and that she should have additional property and her alimony award should be increased. We affirm as modified.

**I. SCOPE OF REVIEW.** Because this is a dissolution case, the scope of review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Schriner*, 695 N.W.2d 493, 495-96 (Iowa 2005). Although weight is given to the fact findings of the district court, the reviewing court is not bound by them. Iowa R. App. P. 6.904(3)(*g*).

**II. BACKGROUND.** We find the following facts that are basically without dispute. The parties met in July of 1969. Evelyn, who was born in 1925, had been married and divorced twice. She had four children, two from each of her prior marriages. George, who was born in 1918, had been married once and his wife died of lung cancer. He had two children from his first marriage. George and Evelyn both had a ninth grade education. Evelyn proposed marriage to George in June of 1970 after they had courted for the year. She believed if they were going to be intimate they should be married. George insisted on an antenuptial agreement before marriage and called his lawyer, H. Elvin Erdahl, to prepare one. After the agreement was drafted, the couple then went to Erdahl's office where they were given the agreement, told by Erdahl that Evelyn had the right to her own attorney, and given time to review it. Erdahl also read the

agreement to the parties. As initially prepared, the agreement provided that the property of each party,[1] be it real or personal, belonging to the party before marriage:

> shall be and remain forever his personal estate, and that this shall include all interest, rents, and profits which may in time accrue, or result in any manner from [the] increase in value, or be collected for the use of the same in any way.

After reviewing the agreement, Evelyn asked that the provision for retention of property be limited to real property, and the agreement was changed by handwritten modification to eliminate any reference to personal property. No statement of the real property owned by either party was referenced nor was a listing of that property attached to the agreement; however, both parties agree that at the time, Evelyn was purchasing a personal residence in Davenport, Iowa, on contract, and George owned an unencumbered 160 acres of farmland in Jones County, Iowa, having purchased it in 1944.[2] George's personal residence and some farm buildings were on the farmland. The value of Evelyn's home at the time was unclear. An appraiser who testified at trial opined that George's farmland was worth about $400 an acre at the time the agreement was signed. There was evidence at trial that the property was now worth $652,000.

The parties married on August 1, 1970. Following marriage Evelyn moved with her daughter from Davenport to George's farm. George's children no longer lived at home. George and Evelyn continued to live on the property and George

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[1] The provisions for both parties' property were identical, except the word "her" was used in reference to Evelyn's property.

[2] He lived there when the parties married.

continued to farm the 160 acres. Evelyn had been employed prior to the marriage, and whether at the time of marriage she was no longer employed, or continued employment during the early part of the marriage, is not clear. At some point George ceased farming and rented his farm to his son for cash rent. The parties lived conservatively, and at the time of the dissolution the 160 acres remained in George's name and was yet unencumbered.

George went into a nursing home in May of 2008. About a week before he was to be released to go back home Evelyn left the farm.

**III. PROCEEDINGS.** On July 22, 2008, Evelyn filed a petition seeking dissolution of her marriage. The matter came on for trial on May 12 and 13, 2009. On May 19, 2009, the district court filed a decision. In addition to the 160 acres in George's name, the court found the parties had separate bank accounts, a joint bank account, a car, and a life insurance policy. The district court valued these assets at approximately $57,000 and divided this personal property so each party received one-half of the $57,000 value. The parties had no debt. There was other personal property not divided by the court that is not at issue here. Evelyn had sold or given her interest in the Davenport home to her son in April of 1971 after she and George were married, so it was not a consideration. George had cooperated with the transfer of the house to her son. The 160 acres with the home, then valued at over $600,000[3] and still without debt, was given to George. The court denied Evelyn any interest in the farmland.

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[3] There was evidence at trial that the property was now worth $652,000.

The district court found, while Evelyn may not have understood all the ramifications of the agreement, she did understand that she would have no further claim against George's farm, and he would have no further claim against her house in Davenport, so that the antenuptial agreement entered into by the parties was enforceable, and as such the farm remained George's property. The district court ordered that George should pay Evelyn alimony of $1000 a month until she dies or remarries or George dies, whichever event occurs first. She was also awarded $6000 towards her attorney fees. Court costs were taxed one-half to each party.

**IV. DIVISION OF PROPERTY.** Evelyn contends that the property division that left her with approximately $27,000 in assets and George with over $627,000 in assets is not equitable, and the district court erred in finding the antenuptial agreement required that George receive all the farmland which, she contends at the time of trial, was worth $652,000. She advances that she should have been awarded $190,000 as her share of the 160 acres.

George contends the division was proper based on the antenuptial agreement Evelyn had signed nearly four decades earlier. Evelyn argues that the agreement should not be enforced because (1) it was signed only a week before their marriage, (2) she only saw the agreement on the day it was signed, (3) though she concedes that she understood George would get the farm, she believed if the parties were married for an extended period she would get something from the farm, (4) there was no discussion before signing the agreement of the effect the agreement would have on marital rights, (5) she did

not have independent counsel, (6) given her experience and education she did not understand the breadth of what she signed, and (7) she thought the marriage would last forever.

George contends (1) Evelyn understood that no matter what happened George's family would get the 160 acres, (2) she signed the agreement voluntarily, (3) she received substantial alimony, (4) his health is not good and nursing home care would cost him about $2225 a month.

Evelyn's testimony convinces us that she clearly understood when she proposed marriage to George that he would only marry her if he were assured that the 160 acres would go to his children when he died, and she was giving up any interest she might have in the property as a result of her marriage. While she was not represented by counsel, she was told and understood she had that right. She read the agreement and had it read to her. Changes she wanted, to exclude the agreement's application to personal property, were made. While she indicated in her testimony she hoped if she were married for an extended period she would get something out of the farm, she was never promised that.

These factors would clearly be relevant if the question before us was whether or not the agreement was enforceable. However, the question before us is whether or not the district court treated both parties equitably in making the property division. To make that decision we need look to Iowa Code section 598.21(5) (2007 Supp.) that directs us to consider a number of factors in dividing all property, except inherited property or gifts received or expected by one party, equitably. Inherited or gifted property is only to be considered upon a finding that

the refusal to divide the property is inequitable to the other party. Iowa Code § 598.21(6).

The resolution reached by the district court is inequitable given the length of the marriage and the fact George leaves this nearly forty-year marriage with a property division that gives him at least $600,000 more than Evelyn receives. In saying this, we recognize that George had the house and 160 acres debt free when he married Evelyn. We also recognize that the parties had an antenuptial agreement and, as the district court found, that Evelyn was not under any duress, coercion, or fraud when she signed the antenuptial agreement, and she clearly understood what was written there. However, unlike the district court, we do not believe the issue of determining whether Evelyn should have additional property interests ends there.

First, the provisions of an antenuptial agreement, even if valid, are only one of numerous factors we are required to consider under section 598.21(5) in dividing property in a dissolution. This agreement did not address what would happen to the parties' property in the event of a dissolution, and had it done so it would, at the time of its drafting, have been void as against public policy.[4] We

[4] When the agreement here was drafted, antenuptial agreements could not bar or affect awards of alimony or division of property. In *Vande Kop v. McGill*, 528 N.W.2d 609, 612-14 (Iowa 1995), the court addressed a malpractice claim against an attorney based on the attorney's failure in 1975 to put in an antenuptial agreement, what would happen to the couple's assets if the marriage ended in a divorce. The court noted, citing *Norris v. Norris*, 174 N.W.2d 368, 369 (Iowa 1970), that had the attorney included this type of language in a 1975 antenuptial agreement, it would have been void under the then-existing law that antenuptial agreements could not bar or affect awards of alimony or division of property. *Vande Kop*, 528 N.W.2d at 613. The *Vande Kop* court also said that at that time, 1975, no Iowa statutes allowed consideration of an antenuptial agreement in alimony or property settlement awards in dissolution cases. *Id.* It noted

therefore do not consider it. We do however consider that George brought this property to the marriage. *See id.* § 598.21(5)(b). We recognize the property has increased in value, but this is primarily due to inflation and not necessarily the parties' effort. We consider also that this is a nearly forty-year marriage and that both parties have made significant efforts to maintain the home and the marriage. *See id.* § 598.21(5)(a), (c). We recognize that George is ninety-one, and Evelyn, eighty-four. They both receive social security benefits. George receives $1,008.80 a month and Evelyn, $361. Her benefits would increase to the amount of George's should he predecease her. The parties' physical and emotional health makes it improbable that either party will work for wages in the future; rather, they both will be required to live off assets, farm rents, and social security as neither has other pensions available, nor is there any expectation that they will have gifted or inherited assets in the future. *See id.* § 598.21(5)(d), (f), and (i). We consider the fact that George was ordered to pay Evelyn alimony of $1000 a month and the fact that if George is required to sell the farmland he will have substantial income tax consequences, however he probably could sell the homestead without income tax consequences. *See id.* § 598.21(5)(h), (j). After considering all these factors and others, we modify to provide that George shall pay Evelyn the sum of $100,000 which shall immediately become a lien on his

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that Iowa Code section 598.21, addressing alimony and property division in a dissolution, did not provide that the court could consider antenuptial agreements in deciding alimony or property division until such amendment was made in 1980. *Id.* Evelyn does not argue here, nor did she argue in the district court, that the agreement should be interpreted as waiving only those rights that could be waived under the agreement when it was signed in 1970, we therefore need not address it.

farmland. It shall be due in six months. If not paid in six months, it shall draw interest at six percent per annum until paid.[5]

We award no attorney fees. Costs on appeal shall be paid one-half by each party.

**AFFIRMED AS MODIFIED.**

[5] "[C]ourts in dissolution proceedings . . . retain the power to award interest according to the equitable principles required by Iowa Code section 598.21." *In re Marriage of Baculis*, 430 N.W.2d 399, 405 (Iowa 1988).